

1979 WL 42867 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 15, 1979

*1 Mr. William T. Putnam
Executive Director
State Budget & Control Board
Box 12444
Columbia, S. C. 29211

Dear Mr. Putnam:

You have recently asked the opinion of this Office concerning whether a contract for services greater than \$1500.00 may be awarded to a fourth lowest bidder on the basis of previous experience.

Section 1-1-440 of the South Carolina Code (1976) provides:

Section 1-1-440. State agencies and departments shall invite at least three bids on certain contracts. Notwithstanding any other provision of law, all State agencies and departments, before contracting for fifteen hundred dollars or more with private individuals or companies for products or services, shall invite bids on such contract from at least three qualified sources.

Provided, however, that the provisions of this section shall not apply to professional services where the person employed is customarily employed on a fee basis rather than by competitive bidding.

In a prior opinion issued by this Office, it was stated that the doing of the work in a proper manner at the lowest possible cost to the public is the purpose underlying the requirement of competitive bidding on public contracts; for this reason, the School Board was found to 'have the absolute right' to not accept (or accept) the lowest bidder although his bid did not have a stipulation as to when the work would be finished, but which error was corrected after the bids were opened and before any were accepted: The purpose of requiring competitive bidding on public contracts is to secure the doing of the work in a proper manner at the lowest possible cost to the public. The public agency or board has the right to accept bids even where they vary in some particulars from the specifications, if the variance does not add to the price of the work. In such a case as we have before us, the School Board would have the absolute right to turn down the bid if it saw fit to do so. However, there is a discretion on the part of authorities to award the contract, if there is some particular failure which does not increase the price, lessen the quality or kind of work to be done or otherwise tend to materially vary the specifications. In the case before us, the bid or proposal was to do everything called for in the specifications. The bid as to the time within which this was to be done had been corrected before the bid was accepted. We believe that the Board has the perfect right to accept this bid, if it sees fit to do so.

1956-57 Op. Atty. Gen. 267.

A contract for public work under a provision that such contracts shall be let to the 'lowest responsible bidder' is to be awarded to the bidder who is responsible and the lowest in price on the advertised basis. Such a requirement does not compel the authorities to award a public contract to the lowest bidder who is financially responsible; the term 'responsible' as thus used is not limited in its meaning to financial resources and ability. Thus, public authorities are invested with discretionary power to pass upon the honesty and integrity of the bidder necessary to a faithful performance of the contract, upon his skill and business judgment, his experience and his facilities for carrying out the contract, his previous conduct under other contracts, and the quality of his

previous work—as well as to pass upon his pecuniary ability, and when that discretion is properly exercised, the courts will not interfere. 64 Am. Jur. 2d Sec. 70 (1972). 72 C.J.S. Public Contracts, Sec. 16 (1975).

*2 However, there is no indication in your inquiry that there is any reason to believe that the lower bidders were not responsible. There is no indication that those bidders other than Wackenhut are not financially responsible, honest or that they lack the skill, experience, business judgment, etc. to adequately perform those services for which the contract calls. It is therefore the opinion of this Office that the fourth lowest bidder may not be selected in the absence of adequate justification for doing so.

I hope this has been of some assistance to you. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Katherine W. Hill
Assistant Attorney General

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